**MALAYAN BANKING BHD**

**v.**

**SYED MANSOR SYED SALIM**

HIGH COURT MALAYA, ALOR SETAR
KN SEGARA J
[CIVIL SUIT NO: 23-96-88]
24 JULY 1996

***CIVIL PROCEDURE:*** *Judgments and orders - Reinstatement - Order made on merits and after hearing parties - Whether judge functus officio - Plaintiff unable and unwilling to proceed with trial - Whether no merit to set aside order - Rules of the High Court 1980, O. 35 r. 2(1)*

The plaintiff bank had filed a claim against the defendant in the High Court for RM102,633.05, but had later amended the claim to RM84,984.61. The court, upon the plaintiff's request for an early trial, then set down the case for trial on 25 June 1996. Having obtained the hearing date, however, the plaintiff filed a summons-in-chambers and applied for the case to be transferred to the Sessions Court ('encl. 35'). On 25 June 1996, *ie*, the date of the trial, the court heard encl. 35 but dismissed it on the ground that the High Court should hear the case without further delay. The court then set itself to hear the plaintiff's case, but could not do so because the plaintiff's counsel was unprepared to proceed with the trial. Apparently, the plaintiff's counsel had taken for granted that encl. 35 would be allowed, and had pre-opted to attend to another matter in the Sessions Court on 25 June 1996.

The learned High Court judge dismissed the plaintiff's claim on the basis that the plaintiff had not adduced any evidence to support its case. Dissatisfied, the plaintiff applied for orders: (1) that dismisssal of encl. 35 be set aside; (2) that a new hearing date be fixed to hear encl. 35; and (3) that the civil action be reinstated and a new mention date thereof be fixed.

**Held:**

**[1]** A transfer to the Sessions Court would have meant a further delay in the final disposal of the case. In any event, the application for transfer ought to be made before the plaintiff set down the action for trial on 22 February 1994 and well before the hearing date was fixed for the trial of the action in the High Court.

**[2]** Encl. 35 was heard on the merits in the presence of counsel for both the plaintiff and defendant. That being the case, the learned judge was already *functus officio* and the application to reinstate the dismissal order could not be entertained.

**[3]** The civil action was dismissed because of the plaintiff's inability to produce evidence in support of its claim and for that the plaintiff's counsel ought to be held responsible. Clearly, a case dismissed for such a reason could not be reinstated. The case was also not a proper case for the court to exercise its discretion under O. 35 r. 2(1) of the Rules of the High Court 1980, as both parties were present when the order was made.

*[Application dismissed.]*

**Legislation referred to:**
Rules of High Court 1980, O. 35 r. 2(1)

*For the plaintiff - Mohamad Sham Mohamad Saad; M/s Jin-Nge & Co*
*For the defendant - Kartar Singh; M/s Kartar Singh Dhaliwal & Co*

*Reported by WA Sharif*

**JUDGMENT**

**KN Segara J:**

The plaintiff bank filed a writ and statement of claim dated 5 September 1988 against the defendant for the sum of RM102,633.05 together with interest at the rate of 10.75% per annum, with monthly rest as from 1 September 1988, until payment (encl. 1). Thereafter, on 30 January 1991 the plaintiff filed an amended statement of claim for the sum of RM84,984.61 together with interest at 10.75% per annum, with monthly rest from 1 August 1900 (?), till date of judgment and, thereafter at the rate of 8%, till date of full repayment (encl. 10). The defendant filed his statement of defence dated 23 January 1992 on 25 January 1992 (encl. 11). The plaintiff finally set the action for trial on 22 February 1994 (encl 25).

By letter dated 25 March 1996 (encl. 26) the solicitors for the plaintiff wrote to the court to fix a hearing date for the trial of the action.

> ...
>
> Kami memohon jasa baik tuan supaya menetapkan suatu tarikh perbicaraan bagi kes di atas memandangkan **kes ini telah lama**.
>
> ... (emphasis provided)

The plaintiff bank, by letter dated 24 April 1996, also wrote to the court for a date of hearing of the action (encl. 26A).

> ... pihak kami masih menunggu Tuan menetapkan satu tarikh perbicaraan bagi kes di atas **sejak awal tahun 1994**, walaupun beberapa peringatan dihantar melalui peguam kami.
> ...

...

(Sgd.)

Abdul Hamid Ku Saad
Pengurus
Pusat Pengurusan Pinjaman
Alor Setar.
(emphasis provided)

By letter dated 25 April 1996 (encl. 27) the court fixed the trial of the action for 5 June 1996. However, upon the request of the solicitors for the defendant by letter dated 30 April 1996 (encl. 28), the court re-scheduled the date of hearing of the action for 25 June 1996 (encl. 29) and all parties were informed accordingly. Again, solicitors for the defendant, by letter dated 7 May 1996 (encl. 30), asked for a postponement but the postponement was refused and all parties were informed by letter dated 15 May 1996 (encl. 31) that the trial of the action would proceed as scheduled on 25 June 1996. The plaintiff **then** filed a summons-in-chambers (encl. 35) to have the case transferred to the Session Court, Alor Setar. The summons-in-chambers was fixed for hearing on the same date as the trial of the civil action – i.e. on 25 June 1996.

On 25 June 1996 I dismissed the application for the transfer of the case to the Sessions Court (encl. 35), notwithstanding the fact the Sessions Court had jurisdiction to hear the case, because I was of the view the action could be disposed off in the High Court, as scheduled, that very day itself (25 June 1996) without any further unnecessary delay, bearing in mind the letters written to court by the solicitors for the plaintiff and the plaintiff itself (encl. 26 and 27A). A transfer to the Sessions Court would certainly have meant a further delay in the final disposal of the case. In any event, the application for the transfer ought to have been made before the plaintiff set down the action for trial on 22 February 1994 (encl 25) and **well before** the hearing date was fixed for the trial of the action in the High Court before me. It was in the best interest of the plaintiff that the trial should proceed in the High Court, as scheduled on 25 June 1996.

When the action was called up for trial in open court on 25 June 1996, the plaintiff's counsel was not prepared to proceed with the trial. His witnesses were not present in court and neither had he issued any subpoenas for his witnesses. Counsel had obviously taken for granted that his application for transfer of the case to the Sessions Court (encl 35) would be allowed, and he had therefore come unprepared to proceed with the trial. Counsel's predicament was his own making. Nevertheless, I was prepared to stand the case down for the plaintiff's counsel to get in touch with his client and proceed with as much of the trial as possible for the day. However, he declined the offer,

saying he had another matter in the Sessions Court! In the circumstances, I dismissed the plaintiff's claim with costs on the basis that the plaintiff had not proved its case, as neither oral nor affidavit evidence was produced to support the claim. I wish to reiterate that the plaintiff's claim was dismissed not because the plaintiff was absent, but because no evidence on behalf of the plaintiff was produced on the date of hearing.

The plaintiff, thereafter, made an application dated 1 July 1996 (encl 39) by summons-in-chambers for the following orders:

i) Bahawa plaintiff diberi kebenaran untuk melanjutkan masa memfailkan permohonan ini walaupun masa tujuh (7) hari telahpun berlalu;

ii) Bahawa Perintah yang dibuat oleh Mahkamah yang Mulia ini pada 25hb Jun, 1996 menolak permohonan Plaintiff melalui Saman Dalam Kamar (Lamp. 35) bertarikh 11hb Jun, 1996 dan tindakan Plaintif di dalam Guaman Sibil No. 23-96-88 dengan kos diketepikan;

iii) Bahawa permohonan Plaintif melalui Saman Dalam Kamar (Lamp. 35) bertarikh 11hb Jun, 1996 tersebut dihidupkan semula dan suatu tarikh pendengaran baru diberi;

iv) Bahawa tindakan Plaintif di dalam Guaman Sibil No. 23-96-88 tersebut dihidupkan semula dan suatu tarikh sebutan baru diberi;

v) Bahawa kos di dalam permohonan ini hendaklah menjadi kos dalam kausa.

The above application came up for hearing before me on 24 July 1996 and I dismissed it without any hesitation, as it was devoid of merits, misconceived and an abuse of the process of court, having regard to the chronological order of events and the conduct of the plaintiff's solicitors and counsel, from the date of the issue of the writ on 11 September 1988 (encl. 11) till the date of the trial of the action on 25 June 1996.

Prayer (iii) was for an order that the application to transfer the case to the Sessions Court (encl. 35) which was dismissed by me on 25 June 1996 **be re-instated** and **a new date** for the hearing of the said summons-in-chambers (encl. 35) be fixed. Prayer (ii) was also related to encl. 35. It was for an order **to set aside the order dismissing the plaintiff's application to transfer the case** to the Sessions Court. With reference to both prayers (ii) & (iii) of encl. 39, I am *functus officio* as the application (encl. 35) was heard on the merits in the presence of counsel for both the plaintiff and the defendant.

Prayer (iv) of encl. 39 was for an order to **re-instate the civil action and for a mention date to be fixed**. The civil action was dismissed with costs on 25 June 1996 because the plaintiff's counsel could not produce any

evidence to support the plaintiff's claim on the date of trial of the action and for which inability the counsel must be personally held responsible, in the particular circumstances of this case, or alternatively, the plaintiff has only itself to blame for not producing its witnesses to testify in court on the said date of trial. A case dismissed on the date of trial for the above reasons shall not be reinstated for hearing and a new mention date fixed. It is not a fit and proper case for the court to exercise its discretion under O. 35 r. 2(1) of the Rules of High Court 1980 to set aside the order of dismissal of the action with costs. Order 35 r. 2(1) reads:

> Any judgment or order obtained where one party does not appear at the trial may be set aside by the Court, on the application of that party, on such term as it thinks just.

The conduct and attitude of counsel in not being ready, able and willing to proceed with the trial on 25 June 1996, as scheduled, is contumelious. This is even more so when the court was prepared to stand the case down to enable counsel to get the plaintiff's witnesses to attend court that very morning itself in order to get on with the trial, but the offer was not taken up.